

**ORIGINAL**

88-6222

2

Supreme Court, U.S.  
**FILED**  
DEC 16 1988  
JOSEPH F. SPANIO, JR.  
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

SCOTT WAYNE BLYSTONE, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondant

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF PENNSYLVANIA

DAVIS & DAVIS

Samuel J. Davis, Esquire  
John M. Purcell, Esquire

107 East Main Street  
Uniontown, Pennsylvania 15401 ☉  
(412) 437-2799

Counsel for Petitioner

INDEX	
	Page
Questions presented.....	2
Opinions below.....	2
Jurisdiction.....	3
Constitutional and Statutory Provisions Involved.....	3
Statement of the Case.....	6
How the Federal Questions Were Raised and Decided Below.....	7
Reasons for granting the writ	
I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE LOWER COURT'S DECISION IN GRANTING/AFFIRMING A COMMONWEALTH CHALLENGE FOR CAUSE OF A PROSPECTIVE JUROR WHEN THE RECORD DOES NOT SHOW THAT THIS PROSPECTIVE JUROR'S BELIEF REGARDING CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS A JUROR.....	8
II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MANDATORY NATURE OF THE PENNSYLVANIA DEATH PENALTY STATUTE RENDERS SAID STATUTE UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.....	12
Conclusion.....	17

## Appendix

	Page
Opinion and Judgment of the Supreme Court of Pennsylvania in this case.....	A-1
Opinion of the Court of Common Pleas of Fayette County, Pennsylvania, in this case.....	A-63
Portion of Trial Record in this case relating to the exclusion of Juror No. 102.....	A-141
Portion of Trial Record in this case regarding the Commonwealth's Closing Argument in Penalty Stage.....	A-145
Portion of Trial Record in this case regarding jury instructions in Penalty Stage.....	A-149
Portion of Trial Record in this case verdict slip in the Penalty Stage.....	A-160



# TABLE OF AUTHORITIES

Cases:	Page
<u>Adams vs. Texas</u> , 448	
U.S. 38, 45, (1980).....	10
<u>Eddings vs. Oklahoma</u> , 455	
U.S. 104, (1982).....	12
<u>Franklin vs. Lynaugh</u> , 108	
S.Ct. 2320 (1988).....	12
<u>Gregg vs. Georgia</u> , 428	
U.S. 153 (1976).....	12
<u>Gray vs. Mississippi</u> , 107	
S.Ct. 2045 (1987).....	11
<u>Hitchcock vs. Dugger</u> , 107	
S.Ct. 1821 (1987).....	12
<u>Lockett vs. Ohio</u> , 438	
U.S. 586 (1978).....	12
<u>Lockhart vs. McCree</u> , 106	
S.Ct. 1758 (1986).....	11
<u>Wainwright vs. Witt</u> , 469	
U.S. 412 (1985).....	10
<u>Witherspoon vs. Illinois</u> , 391	
510.....	8
Constitution and Statutes:	
U.S. Constitution	
First Amendment.....	7, 11
Fifth Amendment.....	7
Sixth Amendment.....	7, 8, 10, 11
Eighth Amendment.....	7
Fourteenth Amendment.....	7, 8, 10, 11
28 U.S.C. §1257 (3).....	6
18 Pa. Cons. Stat. §903	
3701 (A) (1982).....	6

18 Pa. Cons. Stat. §2502	
(1982).....	2
42 Pa. Cons. Stat. §9711	
(1982).....	2, 6, 13

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988

\_\_\_\_\_  
No.

\_\_\_\_\_  
SCOTT WAYNE BLYSTONE, Petitioner  
v.  
COMMONWEALTH OF PENNSYLVANIA, Respondent

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF PENNSYLVANIA

\_\_\_\_\_  
The Petitioner, Scott Wayne Blystone, respectfully  
prays that a writ of certiorari be issued to review the Judgment  
and Opinion of the Supreme Court of Pennsylvania entered in this  
proceeding on October 17, 1988.

QUESTIONS PRESENTED

I. WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS  
UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION  
OF THE UNITED STATES WERE VIOLATED BY THE EXCLUSION FOR CAUSE OF  
A PROSPECTIVE JUROR WHEN THE RECORD DOES NOT SHOW THAT THIS  
PROSPECTIVE JUROR'S BELIEF REGARDING CAPITAL PUNISHMENT WOULD  
PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS  
A JUROR?

II. WHETHER THE MANDATORY NATURE OF THE PENNSYLVANIA  
DEATH PENALTY STATUTE RENDERS SAID STATUTE FACIALLY  
UNCONSTITUTIONAL OR RENDERS THE DEATH PENALTY IMPOSED UPON  
PETITIONER UNCONSTITUTIONAL BECAUSE IT IMPROPERLY LIMITS THE FULL  
DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE  
PENALTY FOR A PARTICULAR DEFENDANT?

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania  
presently sought to be reviewed, not yet reported, appears in  
the Appendix hereto at A-2. The opinion of the Court of Common  
Pleas of Fayette County, Pennsylvania, in this case, which is not  
reported, appears in the Appendix at A-63.



### JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on October 17, 1988 and this writ for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Pennsylvania Consolidated Statutes:

18 Pa. Cons. Stat. §2502

(a) Murder of the first degree - A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

....

(d) Definitions - As used in this section the following words and phrases shall have the meaning given to them in this subsection.

....

"Intentional killing": Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

42 Pa. Cons. Stat. §9711 (1982):

(a) Procedure in jury trials:

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be

sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

....

(c) Instructions to the jury:

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (e) as to which there is some evidence.

(ii) the mitigating circumstance specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by the preponderance of the evidence.

(iiii) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

....

(d) Aggravating circumstances - Aggravating circumstances shall be limited to the following:

(6) The defendant committed a killing while in the perpetration of a felony. ....

(e) Mitigating circumstances - Mitigating



circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.  
...

(4) The age of the defendant at the time of the crime.  
...

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(h) Review of Death Sentence.

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) The sentence of death was the product of passion, prejudice or any other arbitrary factors;

(ii) The evidence fails to support the findings of an aggravating circumstance specified in subsection (d); or

(iii) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the Defendant.

#### STATEMENT OF THE CASE

On June 13, 1984, a jury found the Petitioner, Scott Wayne Blystone, guilty of murder of the first degree, robbery, criminal conspiracy to commit murder and criminal conspiracy to commit robbery. 18 Pa. Cons. Stat. §§2502(a); 3701(a); and 903. The jury that found the Petitioner guilty of these offenses had been selected through a voir dire process in which their beliefs concerning the death penalty had been extensively examined.

The evidence introduced at Petitioner's trial showed that the Petitioner, along with three (3) friends, picked up the victim while he was hitchhiking along a road in Fayette County, Pennsylvania. After picking up the victim, the Petitioner held him at gunpoint for the purpose of robbing him of any money he possessed. The evidence showed that after robbing the victim, the Petitioner proceeded to murder him to prevent his exposure of the robbery.

Immediately following the guilty verdict, a sentencing hearing was held pursuant to the Pennsylvania Death Penalty Statute, 42 Pa. Cons. Stat. §9711. No additional evidence was presented by either the Commonwealth or the Defendant at the sentencing hearing. The Commonwealth relied on the trial testimony and the Defendant refused to offer any evidence of mitigation. The Commonwealth attempted to establish the existence of only one statutory aggravating circumstance: that the murder took place during the perpetration of the felony of

robbery. Before returning with an appropriate verdict, the jury asked the trial judge to redefine what constitutes a mitigating circumstance (A-153). Ultimately, the jury returned a verdict of death finding that the aggravating circumstance of a murder committed during the perpetration of a felony had been proven beyond a reasonable doubt and that no mitigating circumstance had been established (A-160).

HOW THE FEDERAL QUESTIONS  
WERE RAISED AND DECIDED BELOW

The federal issues that the Petitioner raises in this petition concern fundamental constitutional rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The issue concerning the exclusion of a prospective juror was presented throughout the state proceedings, initially through a trial objection and ultimately to the Supreme Court of Pennsylvania. The issue concerning the mandatory nature of the Pennsylvania Death Penalty Statute and its effect in this case was presented to the trial court, the Court of Common Pleas of Fayette County, Pennsylvania and the Supreme Court of Pennsylvania. Both of these courts rejected Petitioner's federal constitutional claims which are raised herein.



REASONS FOR GRANTING THE WRIT

- I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE GRANTING OF A COMMONWEALTH CHALLENGE FOR CAUSE OF A PROSPECTIVE JUROR WHEN THE RECORD DOES NOT SHOW THAT THIS PROSPECTIVE JUROR'S BELIEFS REGARDING CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS A JUROR.

Under Witherspoon vs. Illinois, 391 U.S. 510, 88 S. CT. 1770 (1968), and its progeny, the right to an impartial jury under the Sixth and Fourteenth Amendments prohibits the exclusion of venire members for cause in capital cases unless their stated opposition to the death penalty would prevent or substantially impair the performance of their duties as jurors. The Petitioner asserts that the exclusion of prospective juror No. 102 violates the aforesaid constitutional principal. The record indicates that the following colloquy took place in regard to Juror No. 102:

EXAMINATION BY MR. SOLOMON (District Attorney)

- Q. Do you know of any reason why you should not or could not serve on this jury?  
A. No.  
Q. If, after hearing all the evidence in this case, you believe the defendant to be guilty of murder in the first degree, could you return such a verdict?  
A. Yes.  
Q. If, after all the evidence in this case and the law as his Honor, Judge Adams will give you, and as a member of this jury you believe that the death penalty is warranted, would you impose such a penalty?  
A. Does that mean "capital punishment?" I don't believe in that.

- Q. That is the death penalty.  
Q. Do you have a moral or religious belief against capital punishment?  
A. I am a Baptist and I don't believe in capital punishment.  
Q. Is it against your religious beliefs to support capital punishment?  
A. Yes, it is.  
MR. SOLOMON: Challenge for cause.  
MR. WHITEKO: I would object to the challenge based on her answer.  
JUDGE ADAMS: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. I would overrule the objection.....

(A-143-144).

The lower court justified the exclusion of Juror No. 102 in the following manner:

This court, as to Juror number 102-Hattie M. Royster-had no difficulty in reaching the decision in that her attitude and manner as well as her words, indicated that she had personal and religious beliefs which prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that court's dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and was properly excluded from the jury for cause.

(A-122-23).

The Supreme Court of Pennsylvania held that the record indicated



that this prospective juror could not carry out her duty to follow the law as the trial court instructed and, therefore, was properly excluded (A-15-17). The Petitioner respectfully asserts that the State Courts' determination amounts to constitutional error.

In Wainwright vs. Witt, 469 U.S. 412, (1985), this Court reexamined the Witherspoon rule clarifying the standard for determining whether prospective jurors may be excluded for cause based upon their views on capital punishment. This Court held that the only relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" Id., at 424, quoting Adams vs. Texas, 448 U.S. 38, 45 (1980). The state only has the right to exclude jurors who cannot follow the law as given to them by the trial court. Any broader exclusion would nullify a capital defendant's constitutional right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

In the present case, the answers given by the potential juror do not provide sufficient evidence to justify her removal. The questions and answers merely bring out that her religious beliefs do not allow her to support capital punishment. Such a belief does not justify her exclusion from the jury panel. The questions did not focus on the only relevant legal issue: whether she could follow the law in regard to capital punishment. As

this Court has stated:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart vs. McCree, 106 S.Ct 1758 (1986). In the present case, the prospective juror was never asked whether she could set aside her beliefs and feelings and follow the law. In fact, the prospective juror simply was asked about her own personal beliefs on capital punishment. The exclusion of this juror, on the basis contained in the record, not only violates the Petitioner's Sixth and Fourteenth Amendment rights, but also raises grave First Amendment questions concerning the rights of all prospective jurors. In any event, Witherspoon and its progeny do not constitutionally allow the exclusion of a prospective juror based merely upon a feeling concerning the death penalty. Because the prospective juror was improperly excluded, the Court should grant Certiorari and vacate Petitioner's sentence of death. Gray vs. Mississippi, 107 S.Ct 2045 (1987).

11. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MANDATORY NATURE OF THE PENNSYLVANIA DEATH PENALTY STATUTE RENDERS SAID STATUTE UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.

The decisions of this Court in the capital context have demonstrated a commitment to the principle that the decision to impose the death penalty reflect an individualized assessment of the appropriateness of death for the particular crime and the particular defendant. This principal, that such punishment be directly related to the personal culpability of a criminal defendant, is the corner-stone of this Court's decisions in Lockett vs. Ohio, 438 U.S. 586 (1978), Eddings vs. Oklahoma, 455 U.S. 104 (1982), and Hitchcock vs. Dugger, 107 S.Ct 1821 (1987). These principals have also lead this Court to invalidate mandatory death penalty schemes because they fail to give the jury the opportunity to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence. Gregg vs. Georgia, 428 U.S. 153 (1976).

The Petitioner concedes that the decisions of this Court have allowed the states to structure or guide the jury's determination of the appropriate penalty. This guiding or channeling function has been approved most recently in Franklin vs. Lynaugh, 108 S.Ct. 2320 (1988). The Petitioner asserts that the mandatory nature of the Pennsylvania Death Penalty Statute goes beyond said permissible guiding and improperly limits the

full discretion the sentencer must constitutionally have in deciding the appropriate penalty.

Pennsylvania Death Penalty Statute provides that if the sentencer finds that an aggravating circumstance exists, and no mitigating circumstance exists, or if the sentencer finds that aggravating circumstances outweigh mitigating circumstances, "the verdict must be a sentence of death." 42 Pa. Cons. Stat §9711 (c) (iv) (Emphasis added). In the instance case, the trial court instructed the jury in accordance with this statutory command (A-151-56).

The use of the word "must" suggests that there is some context in which a juror or judge, who, after reviewing all of the evidence relating to the Defendant's character, record and the circumstances of the offense, feels that the penalty should be life, but is nevertheless required to return a verdict of death. In the present case, the jury's repeated questions regarding the meaning of "mitigating circumstances" can reasonably be interpreted as an attempt to find a way to spare the Defendant's life (A-157-59). However, under the statute and the charge of the trial court, this possibility was foreclosed.

The United States Constitution does not permit a state law to require death unless the sentencer was convinced that death was the appropriate penalty. The word "must" merely confuses the sentencer. Furthermore, use of this mandatory language can reasonably infer to the jury that they are not



actually making a moral judgment concerning the appropriate penalty, but rather, are bound by the law to return a verdict of death. In the present case, the jury's confusion over the definition of "mitigating circumstances" reflected their misapplication of the statutory scheme. It is just this idea that capital sentencing jurors are bound by the word "must" that allows prosecutors to argue that the jurors are not really choosing death at all.

In the present case, the District Attorney, in his closing argument of the sentencing phase, stated the following:

Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty; so each of you were asked last week when we questioned you whether or not, under the appropriate circumstances, you could impose the death penalty and each of you replied that that you could. Each of you replied that you would follow the law, and each of you replied that whatever your duty was, you would follow it . . . . You must determine from the evidence presented in this courtroom whether or not there are any mitigating circumstances; If not, you must follow the law and impose the death penalty. Once again, as in the initial proceedings where you determine guilt or innocence, you cannot be guided by sympathy for the

Defendant or the victim. You must follow the law and I am confident that you will.

(A-147-48). These characterizations of the jury's role by the District Attorney in this case are not accurate reflections of a jury's true role under a constitutional capital sentencing procedure. The fact that a sentencing jury finds that there are no mitigating circumstances or finds that aggravating circumstances outweigh mitigating circumstances, should mean that, after considering all of the evidence, the jury is convinced that death is the appropriate penalty. Of course, once they are so convinced, they should return a sentence of death. But this is their "duty" only in the sense that they are duty bound to make such a judgment in the case.

In such a circumstance, the word "must" would be unnecessary and inappropriate. The jury would return a sentence because they felt that it was the proper sentence. Accordingly, a reasonable juror will quite naturally assume that he is being told to return the death penalty against his will because it is his duty to do so. This is not true and could not be true, but it is a logical and reasonable inference of the statutory language, the jury charge, and the prosecutorial argument based

thereon. This is particularly true when a defendant, as in the present case, elects not to submit any mitigating evidence during the sentencing stage of his trial. As a result, the statutory procedure by which the Petitioner was sentenced to death was unconstitutional and the sentence of death should be vacated.

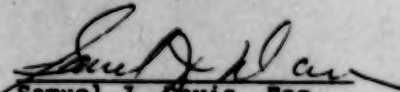
CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

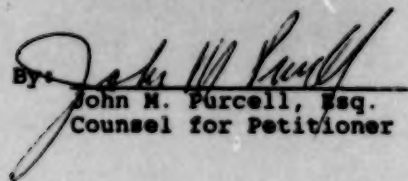
Respectfully submitted,

DAVIS & DAVIS

By:

  
Samuel J. Davis, Esq.  
Counsel for Petitioner

By:

  
John M. Purcell, Esq.  
Counsel for Petitioner

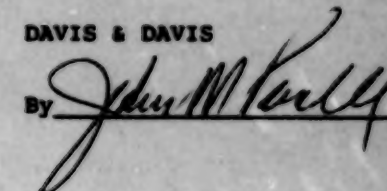
CERTIFICATE OF SERVICE

I do hereby certify that I have this date mailed a true and correct copy of the within document to the following persons and/or counsel by first class mail.

Alphonse P. Lepore, District Attorney  
Fayette County Courthouse  
Uniontown, Pa 15401

DAVIS & DAVIS

By:



DATED:

Dec. 16, 1988